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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION, *et al.*, Plaintiffs, v. S.M.R. JEWELL, *et al.*, Federal Defendants, and OCOTILLO EXPRESS LLC, Intervenor-Defendants.	No. 12-cv-2211-GPC-PCL **MEMORANDUM AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION IN SUPPORT OF SUMMARY JUDGMENT** Date: October 4, 2013 Time: 1:30 pm Courtroom: 2D Judge: The Hon. Gonzalo P. Curiel

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INTRODUCTION[1]

This Court has twice upheld the decision by the Bureau of Land Management ("BLM") to authorize a right-of-way ("ROW") grant to Ocotillo Express, LLC ("Applicant") to use 10,151 acres of public lands for the Ocotillo Wind Energy Facility Project ("OWEF" or "Project") and to amend the 1980 California Desert Conservation Area ("CDCA") Plan to allow for wind energy development on the Project site. *Desert Protective Council v. U.S. Dep't of the Interior*, No. 12-cv-1281, 2013 WL 755913 (S.D. Cal. Feb. 27, 2013); *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior*, No. 12-cv-1167, 2013 WL 755606 (S.D. Cal. Feb. 27, 2013). The Court based those decisions "on a careful review of the administrative record" and found "the BLM's decision to approve the [Record of Decision] was reasonable as it considered all relevant factors and provided an analysis that presented a rational connection between the facts found and the conclusions it made based on relevant law." *Quechan Tribe*, 2013 WL 755606, at *2; *Desert Protective Council*, 2013 WL 755913, at *2. Plaintiffs here challenge the very same decision, a decision that this Court has already deemed on two separate occasions to be "not arbitrary, capricious or an abuse of discretion." *Id.* Portions of Plaintiffs' brief nevertheless raise issues that have already been addressed by this Court. While the remainder purports to identify different aspects of the agency's final decision that allegedly violate the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 ("NEPA"), the Federal Land Policy & Management Act of 1976, 43 U.S.C. §§ 1701-1787 ("FLPMA"), and the Migratory Bird Treaty Act, 16 U.S.C. § 701-719c ("MBTA"), Plaintiffs have failed to present anything new that would compel a different result from *Desert Protective Council* or *Quechan Tribe*. Therefore, for the reasons set forth below, this Court should deny Plaintiffs' motion for summary judgment

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, S.M.R. Jewell substitutes Ken Salazar, Neil Kornze substitutes Robert Abbey, and Thomas Zale substitutes Margaret Goodro.

and grant Federal Defendants' cross-motion for summary judgment.

FACTUAL BACKGROUND

In compliance with its obligations under NEPA and the CDCA Plan, the BLM prepared an environmental impact statement ("EIS") for the OWEF. The original OWEF proposal consisted of 193 wind turbines, which was initially reduced by the Applicant to 155 in order to avoid impacts to cultural resources and to minimize certain environmental impacts, such as those to Peninsular big horn sheep ("PBS"). OWEF-847. On March 9, 2012, the BLM issued the Final EIS. The Final EIS is a comprehensive document consisting of 2,834 pages and appendices, not including other secondary documents that were relied on therein. The Draft and Final versions of the EIS provide a comprehensive analysis of the impacts of the Project on various environmental, social, economic, biological, and cultural resources. *See* OWEF-811-20 (listing the various resources analyzed). As analyzed in the Final EIS, the Project would have utilized 155 turbines and would have been situated on approximately 12,436 acres. However, as a result of tribal consultations and comments on the Draft EIS, the Applicant further reduced the number of turbines from 155 to 112, OWEF-864, shrinking the footprint to 10,151 acres, almost 60 percent smaller than the original proposal. The Final EIS dubbed this reduced configuration the "Refined Project" and identified it as the preferred alternative. On May 11, 2012, the BLM issued the Record of Decision ("ROD") approving the ROW grant and associated CDCA Plan Amendment for the Refined Project. OWEF-103. The Refined Project has only seven more turbines than the most environmentally protective action alternative analyzed in the Final EIS (Alternative 3). *See* OWEF-864.

NEPA's public participation and land use planning process for the Project was robust. The BLM held two public scoping meetings on January 5 and 6, 2011, in El Centro and Ocotillo, California, to formally solicit public and agency input on the issues to be addressed in the EIS. OWEF-1674-75. At the close of the scoping period, the BLM received thirty-three comment letters, which helped to form the alternatives

analyzed in the Draft EIS. OWEF-1676. Six unique alternatives were considered in detail. OWEF-11920. The Draft EIS analyzed three full action alternatives, one No Action Alternative, and two No Project Alternatives. *Id.* The No Action Alternative differs from the two No Project Alternatives in that the No Project Alternatives would not authorize the issuance of the ROW grant but did consider amendments to the CDCA Plan to designate the area either as unsuitable (Alternative 5) or suitable (Alternative 6) for wind energy development. *Id.* In addition to the alternatives that were analyzed in detail, the Draft EIS also discussed several alternatives that were considered but eliminated from further consideration because they "did not meet [the] project purpose and need, project objectives, were deemed to be technically disadvantageous, or had greater environmental impacts than the currently proposed project alternatives." OWEF-11952. The Draft EIS was then distributed for public and agency review and comment on July 8, 2011. OWEF-149. The comment period closed on October 6, 2011, three months after the Draft EIS was released. *Id.* Overall, the BLM received thousands of comments and duly responded to all of the issues raised in those comments. *See* OWEF-3248-631.

RELEVANT STATUTORY BACKGROUND AND STANDARD OF REVIEW

I. National Environmental Policy Act

Congress enacted NEPA to establish a process for federal agencies to consider the consequences of their actions upon the environment. *See* 42 U.S.C. §§ 4321-4370h. To ensure informed decision-making, NEPA requires agencies to analyze and disclose the significant environmental effects of a proposed action, but it does not require any particular decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA "does not impose any substantive requirements[;] … it exists to ensure a process." *Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (*en banc*) (citation and quotations omitted). When an agency proposes a "major Federal action[] significantly affecting the quality of the human environment," NEPA requires preparation of an EIS. 42 U.S.C. § 4332(2)(C).

II. FLPMA and the CDCA Plan

FLPMA "is primarily procedural in nature." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). FLPMA has a multiple use mandate, requiring public lands to be managed in a manner that will protect, *inter alia*, the quality of historical, ecological, environmental, air and atmospheric, water, and archeological resources, while also facilitating the utilization of such resources. 43 U.S.C. § 1701(a)(8), (10), (12). FLPMA designated approximately 25 million acres of public land in southern California as the CDCA. *See* 43 U.S.C. § 1781(b), (c). To manage the 12 million acres of the CDCA under its jurisdiction, the BLM adopted the CDCA Plan in 1980, amending it numerous times since then.[2] Consistent with FLPMA, the CDCA Plan emphasizes that "multiple use, sustained yield, and the overall maintenance of environmental quality are the context for the CDCA management . . . ." OWEF-5914.

The CDCA Plan allocates lands into four "multiple-use" classes. OWEF-5920. Class L lands, such as the ones at issue, "protect[] sensitive, natural, scenic, ecological, and cultural resource values." *Id*. The CDCA Plan does not, however, prohibit development on Class L lands; it simply states that they are to be managed "to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." *Id.* (emphasis added). Resource development activities are allowed if the activities meet the guidelines specified in the Plan. OWEF-5921. Pursuant to those guidelines, wind energy generation facilities are permitted on Class L lands so long as "NEPA requirements are met." OWEF-5922.

III. The Migratory Bird Treaty Act

The MBTA makes it unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory birds, as well as their nests and eggs, "[u]nless and except as permitted by regulations." 16 U.S.C. § 703(a); 50 C.F.R. § 10.1. Most relevant to this

[2] From 1980 to 1999, the CDCA Plan has been amended 147 times. OWEF-5908.

case is the prohibition against "take," which is defined in the regulations: "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12. On its face, the MBTA is a criminal statute. *See, e.g.*, 16 U.S.C. §§ 706, 707(a)(d). As such, the statute does not include a citizen-suit provision through which private citizens can bring a cause of action to enforce its provisions. *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 438 F.3d 937, 942 (9th Cir. 2006). However, courts have held that private citizens can assert a claim against a federal agency pursuant to § 706(2) of the Administrative Procedure Act ("APA"), on the grounds that the agency action is arbitrary or not in accordance with law because it violates the MBTA. *Id*. at 942.

The U.S. Fish & Wildlife Service ("FWS") implements the MBTA. FWS is authorized to issue permits that allow intentional take of migratory birds under certain circumstances, where it is "compatible with the terms of the conventions." 16 U.S.C. § 704(a); *see generally* 50 C.F.R. §§ 21.1-21.61. However, while regulations exists to apply for permits to commit *intentional* take, FWS presently does not have regulations for the issuance of permits to commit *unintentional* take that occurs incidentally to an otherwise lawful activity. *See* 50 C.F.R. Part 21.

IV. Review of Agency Action under the Administrative Procedure Act

Challenges to an agency's decision under the APA must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *McNair*, 537 F.3d at 987; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Agency action must be upheld if it considered the relevant factors and articulated a rational connection between the facts found and decisions made. *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). As a result, the scope of judicial review is narrow, and courts are not to substitute their judgment for the

agency's. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

ARGUMENT

I. The BLM's Purpose and Need Statement Complies with NEPA

The appropriate range of alternatives is confined by the EIS's statement of purpose and need. 40 C.F.R. § 1502.13; *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). NEPA's implementing regulations state that an agency "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Agencies are "afforded considerable discretion to define the purpose and need of a project." *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998); *see also City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986). The purpose and need is evaluated under the deferential "reasonableness" standard. *Friends of Se.'s Future*, 153 F.3d at 1066-67. By all accounts, the BLM's purpose and need statement is a reasonable one.

The purpose and need for the OWEF "is to respond to a FLPMA ROW application submitted by the Applicant to construct, operate, maintain, and decommission a wind energy-generating facility and associated infrastructure on public lands administered by the BLM in compliance with FLPMA, BLM ROW regulations, and other applicable Federal laws and policies." OWEF-848. The Final EIS stresses that the purpose and need is designed to address the following management objectives: (1) to act expediently and to increase the "production and transmission of energy in a safe and environmentally sound manner" pursuant to E.O. 13212; (2) to approve non-hydropower renewable energy projects on public lands with a generation capacity of at least 10,000 MW by 2015 pursuant to the Energy Policy Act of 2005; and (3) to establish the development of renewable energy as a priority for the Department. *Id.* These objectives – which served the basis for the BLM's consideration of alternatives – are reasonable because they are fully consistent with Congressional and Secretarial mandates as outlined in Executive Order 13212, the

Energy Policy Act of 2005, and Secretarial Order 3285A1. Specifically, the stated objective to "further the development of environmentally responsible renewable energy as a priority for the Department of the Interior" is consistent with Congressional and Secretarial mandates that direct the Department to foster and increase renewable energy development on public lands. *Id.* As such, the purpose and need statement is not unreasonably narrow because it fulfills these directives. *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (in developing the purpose and need "an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them in the agency's statutory authorization to act, as well as in other congressional directives") (citations omitted); *Ala. Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013) (concluding that the agency "thought hard" about Congress' directives and the applicant's objectives in formulating the purpose and need statement).

The purpose and need statement is also reasonable because it is consistent with the CDCA Plan's goals and objectives, which include the specific goal of "[i]dentify[ing] potential sites for geothermal development, wind energy parks, and powerplants." OWEF-6000 (emphasis added). *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-13 (9th Cir. 1999) (finding that the purpose and need for a land exchange to consolidate ownership of specific private and public lands was not unreasonably narrow because it furthered the objectives of the regional forestry plan to consolidate land ownership patterns) (citation omitted); *Narrows Conservation Coal. v. Granthan*, 166 F.3d 1218, at *1 (9th Cir. 1999) (finding that Forest Service's purpose and need for a proposed project was not unreasonably narrow when it was developed, in part, to achieve the goals stated in the Tongass Land Management Plan) (unpublished).

Plaintiffs, nonetheless, argue that the purpose and need statement violates NEPA because the BLM simply adopted the Applicant's objectives rather than develop its own. Pls.' Br. at 3, ECF No. 25. Such is not the case. The BLM formulated its own purpose and need but did so with the Applicant's goals and needs in mind. When an agency is to

act upon a project applicant's request, such as an application for a ROW grant, it is not improper for that agency to consider the applicant's goals. *Ala. Survival*, 705 F.3d at 1085 (purpose and need statement "can include private goals, especially when the agency is determining whether to issue a permit or license"); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011) (holding that the BLM reasonably defined its purpose and need as responding to private operator's proposal); *Citizens Against Burlington*, 938 F.2d at 196; *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 423 (4th Cir. 2012); *Citizen's Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002).

Indeed, under FLPMA and the BLM's regulations and policies, the agency must act upon the Applicant's request. As explained in the BLM's NEPA Handbook, for "[a]n externally generated implementation action . . .[t]he purpose of the action is to provide the owners of private land . . . with legal access across public land managed by the BLM [and] [t]he need for the action is established by the BLM's responsibility under FLPMA to respond to a request for a Right-of-Way Grant . . . ." OWEF-5349. There is a difference between a purpose and need statement that "enacts or adopts" an applicant's request and one that "acts upon" an applicant's request. In the former, the purpose and need "might be unreasonably narrow to the extent it presupposes approval of the proposal," while in the latter, the agency retains its discretion to either adopt or reject the proposal as was the case here. *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73.

Despite this overwhelming authority that supports the BLM's purpose and need, Plaintiffs rely on a single case, *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2010) ("*NPCA*"), to bolster its position that the BLM improperly considered the Applicant's purpose and need. Pls.' Br. at 3. *NPCA*, however, is wholly inapposite. In *NPCA*, the court found, and the BLM did not dispute, that three of the four goals articulated in the EIS were purely to fulfill the project proponent's goals. 606 F.3d at 1071. Here, the Project's goals do not just address the Appli-

cant's objectives, because, as stated above, the BLM has a real and legitimate interest in fostering renewable energy development on public lands. Moreover, in the present case, the Final EIS very clearly outlines the BLM's purpose and need, OWEF-848, separate and apart from the Applicant's objectives, OWEF-849. Such was not the case in *NPCA*. Further, the court in *NPCA* found that the purpose and need unreasonably constrained the possible range of alternatives as demonstrated by the fact that "[a]ll of these [alternatives], save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur." 606 F.3d at 1072. The same cannot be said here as three of the six alternatives (i.e., the No Action Alternative, Alternative 5, and Alternative 6) did not contemplate approval of the requested ROW.

II. The BLM Considered a Reasonable Range of Alternatives

NEPA requires agencies to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. "Judicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.'" *State of Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (quoting *Save Lake Wash. v. Frank*, 641 F.2d 1330, 1334 (9th Cir. 1981)); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d. 853, 866 (9th Cir. 2004). As stated above, the appropriate range of alternatives is confined by the EIS's statement of purpose and need. 40 C.F.R. § 1502.13; *Carmel*, 123 F.3d at 1155.

Plaintiffs contend that the BLM failed to consider non-wind renewable energy alternatives. Pls.' Br. at 4-5. Because the range of alternatives is confined by the purpose and need statement, the BLM appropriately limited the alternatives to those that would actually respond to the Applicant's request to develop a wind energy facility. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (noting that an agency is not required to consider "alternatives known to be unacceptable at the outset");

Carmel, 123 F.3d at 1155 (an EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones."). Some of Plaintiffs' proposed alternatives, like tidal and wave energy, are truly off the mark – not only do these alternatives fail to address the purpose and need, many of these methods were considered infeasible.[3] OWEF-911-12.

Similarly, Plaintiffs' argument that the BLM should have considered alternative sites for the OWEF ignores the record that shows the BLM and the Applicant did consider such sites but eliminated them because they would not support the Project. Because the proposed action is a wind energy project, an area with high wind density is essential. The only area within BLM administered lands that meets that criterion is the proposed Project site. As explained in the Final EIS, "[m]uch of the BLM-administered land in the areas with the highest wind energy resource in Imperial County is excluded from potential development by special designations such as wilderness areas and ACECs. For those lands outside those designated areas, many potentially suitable areas are in use or are proposed for other wind energy projects."[4] OWEF-908; *see also* OWEF-914 (project area characterized by "predominant and strong winds"). Another site was considered, but it did not have the high wind potential necessary to execute the project's objective and, at the same time, keep environmental impacts to a minimum. OWEF-908. The BLM also considered private lands, but it determined that those lands did not have necessary wind energy potential for the proposed Project. OWEF-907.

Nor is there any merit to Plaintiffs' argument that the BLM should have looked outside of Imperial County for potential project sites. First, this would not respond to the Applicant's ROW application and, thus, would be inconsistent with the purpose and need statement. *See supra* at 6-9. Second, the record shows that even outside of Imperial

[3] As noted in the Final EIS, the OWEF is nowhere near a body of water that would generate tidal or wave energy. OWEF-911.

[4] ACECs or "Areas of Critical Environmental Concern" are specially designated areas where special management attention is necessary to protect and prevent irreparable damage to resources. *See generally* OWEF-1043.

County, there are limited areas that have enough wind energy potential to sustain the Project. OWEF-1829-31; OWEF-19528.

Theodore Roosevelt Conservation Partnership is instructive. Conservation groups there, like Plaintiffs here, argued that the BLM's purpose and need was "unreasonably narrow" because it responded to the project proponent's request for increased oil and gas production. 661 F.3d at 73. They then alleged that the range of alternatives was skewed toward development because, other than the No Action alternative, all the action alternatives involved some production. *Id.* at 74. The court disagreed and held that "[t]he Bureau selected a reasonable range of alternatives in light of its purpose; it was under no obligation to include a scaled-back-development alternative that would not 'bring about the ends of the federal action.'" *Id.* at 74-75 (citations omitted).

The outcome should be no different here. None of Plaintiffs' proposed alternatives would further the stated purpose and need, and accordingly, the BLM properly eliminated them from further consideration. Consistent with the applicable requirements, all the BLM was obligated to provide were reasons why these alternatives were not carried forward. 40 C.F.R. § 1502.14(a) ("for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."); *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1012-13 (9th Cir. 2011).

III. The BLM Took a "Hard Look" at Environmental Impacts

A. The BLM Sufficiently Analyzed Infrasound and Low-Frequency Noise

An EIS must contain "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a proposed action. *Carmel*, 123 F.3d at 1150 (quotation marks and citation omitted). An agency, however, need only focus on the issues "that are truly significant to the action in question." 40 C.F.R. § 1500.1(b); *Hapner v. Tidwell*, 621 F.3d 1239, 1245 (9th Cir. 2010) (quoting 40 C.F.R. § 1500.1(b)). "Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues." 40 C.F.R. § 1502.2(b).

Plaintiffs contend that the BLM failed to consider the impacts of infrasound and low-frequency noise (i.e., "inaudible" noise). They are simply incorrect. The Final EIS discusses "inaudible" noise under the section, "Public Health and Safety." OWEF-1349; *see also* OWEF-3330 ("Potential health effects related to inaudible sound pressure are discussed in Section 4.11, Public Health and Safety."); OWEF-19167-68 ("inaudible" noise as discussed in the Wind Programmatic EIS). Thus, it is not that the BLM failed to analyze "inaudible" noise; rather, Plaintiffs' real complaint is that the BLM did not reach the conclusion Plaintiffs desired.

NEPA does not require a lengthy discussion of impacts that are less than significant. 40 C.F.R. § 1502.2(b). Here, the BLM explained at length that "inaudible" noise is not expected to be significant. OWEF-3428 (noting that study showed that infrasonic sound emissions from modern upwind-configured wind turbines are below audibility thresholds for even the most sensitive person and that infrasound levels measured at a distance of 1,000 feet from a turbine were more than 20 dB below the median thresholds of hearing); OWEF-1693 (citing two studies supporting the BLM's determination that "inaudible" noise is unlikely to be an issue); OWEF-35219 ("There is no reliable evidence that infrasound below the perception threshold produces physiological or psychological effects."); OWEF-1693-94 (discussing Wind Turbine Syndrome and concluding that impacts will be minimal).

While Plaintiffs maintain that their cited studies demonstrate that "inaudible" noise causes adverse health impacts, the BLM concluded otherwise.[5] In such cases where there

[5] Plaintiffs claim that the BLM "fails to identify" the Geoff Leventhall report that the agency cites in response to comments. Pls.' Br. at 10. The BLM does, in fact, identify the report as "Low Frequency Noise from Wind Turbines and Other Sources." OWEF-1692. Plaintiffs also attack the BLM's cited studies alleging that they do not address "inaudible" noise. Pls.' Br. at 11. The O'Neal study, however, very clearly addresses low frequency noise and infrasound. *See* OWEF 55810-32. Infrasound, even under Plaintiffs' own definition, "includes frequencies less than 20 hertz ("Hz"), below the normal range of human hearing." Pls.' Br. at 7 n.1 (emphasis added).

is a difference of opinion, "the [agency's] determination is due deference – especially in areas of [its] expertise." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1251 (9th Cir. 2012) (quoting *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 667, 682 (9th Cir. 2000)). The law is clear, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts, even if a court may find contrary views more persuasive." *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (citation omitted).

Nor is there any merit to Plaintiffs' claim that the BLM "ignored" Plaintiffs' cited studies. OWEF-1692. The BLM considered these studies but did not reach the same conclusions as Plaintiffs. This, however, is not a basis to invalidate the Final EIS and ROD. *W. Watersheds Project v. Abbey*, No. 11-35705, 2013 WL 2532617, at *10 (9th Cir. June 7, 2013). Here, the BLM concluded that impacts from "inaudible" noise would be minimal, and the Final EIS's coverage of this issue is fully compliant with NEPA.

B. The BLM Sufficiently Analyzed Audible Noise

Plaintiffs also allege that the BLM underestimated audible noise impacts, but this argument lacks merit because it boils down to a dispute over the methodology employed to assess those impacts. A disagreement over methodology does not provide a basis to strike the BLM's decision. *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1184-85 (9th Cir. 2000) ("[T]he decision not to employ a different methodology or particular empirical studies does not suffice to show arbitrary or capricious action."); *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) ("The mere fact that [plaintiffs] disagree with the methodology does not constitute a NEPA violation."). Indeed, the "highest level of deference" is applied to an agency's scientific judgments. *Native Ecosystems Council*, 697 F.3d at 1053. And when a disagreement arises, the court "must defer to agency experts." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012) (emphasis in original).

First, Plaintiffs contend that the BLM did not use the normalization factors from

the EPA Levels Document (1974) to accurately assess the wind turbines' audible impacts in a rural setting. Pls.' Br. at 12 (referring to Richard James comment at OWEF-4325). Instead, the BLM relied on Imperial County's General Plan Noise Element, which does not require the normalization of noise data. *See* OWEF-3423. While Plaintiffs may have preferred that the BLM use the adjustment factors recommended by the EPA,[6] NEPA does not compel such a result. "NEPA does not require that [a court] decide whether an [EIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985); *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993). Accordingly, the BLM's decision to rely upon County standards to analyze the Project's noise impacts – standards that the Project met – is entitled to deference and should be upheld. *Cf. Sierra Club v. Tahoe Regional Planning Agency*, No. 2:12-0044, 2013 WL 79947, at * 40 (E.D. Cal. Jan. 4, 2013) (upholding the County's noise analysis under the California Environmental Quality Act, which relied upon the County's noise ordinance standards as the baseline for analysis).

Second, Plaintiffs allege that the BLM failed to measure both daytime and nighttime noise and that, as a result, the Final EIS understates the noise level impacts. Pls.' Br. at 13. While nighttime noise was not measured, it was nonetheless accounted for in the analysis. The Final EIS recognizes that sensitivity to noise increases during these times and added "artificial noise penalties" to adjust for this sensitivity. OWEF-991. For example, a 5dB upward adjustment was made for the hours between 7:00 pm and 10:00 pm, and a 10dB upward adjustment was made for the hours between 10:00 pm

[6] Ironically, while the Plaintiffs fault the BLM for using the County's guidelines, the Environmental Protection Agency ceased regulating noise in 1981 when it closed its Office of Noise Abatement and Control and transferred that responsibility to State and local governments – entities that the agency recognized as better suited to addressing this issue. *See* http://www.epa.gov/air/noise.html (last visited July 17, 2013). Here, the BLM relied upon the standards set forth by the local experts.

and 7:00 am. *Id.* Again, Plaintiffs may have preferred that actual measurements of nighttime noise were taken, but it was also entirely appropriate for the BLM to account for nighttime noise impacts in the way that it did. *Busey*, 938 F.2d at 200 (upholding the agency's noise analysis, which applied a penalty to adjust for nighttime overflight noise).

C. The Final EIS Adequately Discusses Noise Mitigation

NEPA requires an agency to discuss possible mitigation measures, 42 U.S.C. § 4332(C)(ii), which include those that are "not already included in the proposed action or alternatives," 40 C.F.R. § 1502.14(f). The regulations further require the agency to identify means "to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f))." 40 C.F.R. § 1502.16(h). That said, an EIS need only contain a "reasonably complete discussion of possible mitigation measures." *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (emphasis added); 40 C.F.R. § 1505.2(c).

Plaintiffs contend that the BLM "refuses" to address setbacks as a potential mitigation measure.[7] Pls.' Br. at 14. Plaintiffs are mistaken. The Final EIS clearly states that "[n]o mitigation is available to reduce this impact without removal of wind turbines." OWEF-1324. This drastic measure would not be commensurate with the level of impact as even Plaintiffs concede that, at most, "dozens" of residents may be affected. Pls.' Br. at 14. And to keep the issue of noise in perspective, noise impacts were conservatively modeled to produce the highest potential impact. OWEF-1303 ("The simulation approach assumed Siemens 2.3 MW turbines for all 158 turbines, operating at full load, and operating 24-hours per day (for Ldn determination) to assess the worst case for noise generation by the wind turbines."). Even under the worst case scenario, only "some residences would experience noise levels slightly above 40 dBA Leq when temperatures

[7] Plaintiffs contend that Dr. Nina Pierpont and the French National Academy of Medicine have recommended setbacks of 1 mile or more. Pls.' Br. at 14. It should be clarified that Dr. Pierpont and the French National Academy of Medicine did not comment on this particular project. Plaintiffs cite to their own comments that simply refer to these studies. *See* OWEF-3966-67.

are low and relative humidity is high." *Id.* This is predicted to occur less than 1 percent of the year. OWEF-3421-22. Under real world conditions, however, the wind turbines are not expected to run continuously and at full-load 24-hours a day.[8] Moreover, the Project's worst case estimated noise impacts are below Imperial County's most stringent noise limits applicable to residential areas. *See, e.g.*, OWEF-1304.

Plaintiffs mistakenly rely on *South Fork Band Council of Western Shoshone v. U.S. Department of the Interior*, 588 F.3d 718 (9th Cir. 2009), to show that the discussion of noise mitigation in this case was inadequate. In *South Fork*, while conceding that the environmental harms would be significant, the Final EIS had a cursory statement that "[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan." *Id.* at 727. There is nothing remotely similar at issue here. The BLM has candidly disclosed that, short of turbine removal, there are no feasible mitigation measures that will address the identified audible noise impacts, especially when those impacts do not exceed any local standards. NEPA does not compel an agency to detail mitigation measures that are infeasible or impractical. *WildEarth Guardians v. U.S. Forest Serv.*, 828 F. Supp. 2d 1223, 1239 (D. Colo. 2011) (NEPA did not require the Forest Service to provide an extended discussion of mitigation measures it deemed were not practical); *S.F. BayKeeper v. U.S. Army Corps of Eng'rs*, 219 F. Supp. 2d 1001, 1020-21 (N.D. Cal. 2002) (finding that Corps did not need to provide detailed discussion of suggested mitigation and adequately discussed and concluded such measures were neither feasible nor necessary).

Here, NEPA only requires a discussion of "practicable" means of mitigation, and the BLM fully complied with that requirement based on the magnitude of the impacts it identified. *See* 40 C.F.R. § 1505.2(c).

[8] It should also be noted that while noise impacts were modeled using 158 wind turbines, the Refined Project only includes 112 turbines, thereby further reducing the actual noise impacts.

D. The BLM Adequately Analyzed Visual Impacts

Plaintiffs suggest that the BLM did not consider the visual impacts from the non-turbine components of the Project. Pls.' Br. at 15. This allegation is contradicted by the Final EIS, which devotes 19-pages to address impacts to visual resources by the Project as a whole. Contrary to Plaintiffs' assertion, the visual impacts of the Project in its entirety were analyzed to include a discussion of each phase of the Project – construction, operation, maintenance, and decommissioning. OWEF-1483-1502. The fact that the analysis focuses on the wind turbines should not be surprising as they are the most prominent feature of the Project; the substation and switchyard have a very small footprint in relation to the turbine configuration. *See* OWEF-1821. Moreover, mitigation for visual impacts includes reduction of the impacts associated with the substation, ancillary facilities, and transmission structures. OWEF-1501-02. Thus, it is patently false to say the BLM did not address these other features of the Project.

Plaintiffs further misunderstand the role of the Visual Resource Management ("VRM") classifications to evaluate visual impacts under NEPA. Plaintiffs contend that there is a "conflict" between the technical appendices' and the Final EIS's description of the VRM Class. Pls.' Br. at 16. There is no conflict. Plaintiffs' argument confuses the BLM's Visual Resource Inventory ("VRI") Class with its selected VRM Class for an area. The latter is intended to capture the existing visual quality of an area, while the former reflects the BLM's decision on how to manage those resources. *See, e.g.*, OWEF-5678. For the purposes of NEPA, the BLM evaluated visual impacts using VRI Class II and Class III as baselines. OWEF-3415. The BLM never used interim VRM Class IV as a baseline. The BLM, however, found through the NEPA analysis that the Project can only conform to interim VRM Class IV objectives and designated the Project site accordingly.[9] OWEF-1484; *see also* OWEF-56331. Thus, VRI Class II and Class III

[9] This Court has already affirmed BLM's change of the interim VRM designation for the Project site. *Quechan*, 2013 WL 755606, at *14.

(Footnote continued)

were the baseline for the visual impacts assessment, but the interim VRM Class IV was the final interim VRM Class designation for purposes of determining plan conformance.

E. The BLM Adequately Analyzed Impacts to Peninsular Big Horn Sheep

As an initial matter, Plaintiffs overstate the presence of PBS in and around the Project site. *See* Pls.' Br. at 16-17. The Final EIS discloses that "[n]o OWEF project components are proposed for construction on land currently occupied by the PBS." OWEF-1587. The only recent sighting of PBS has occurred in the I-8 Island and along the portion south of Site 1. OWEF-1587-88. This limited use of the Project site by PBS has been confirmed by FWS, the federal government's wildlife experts. FWS has determined that PBS only "sporadically" use the Project site, any loss to habitat would not be within critical habitat, the impacted area represents "a small fraction of comparable habitat otherwise available to the population, and habitat connectivity would not be disrupted. OWEF-185. FWS went on to say that even if the PBS avoided the Project site, it "would not represent a substantial loss of habitat for the Peninsular bighorn sheep nor threaten its recovery." *Id; see also* OWEF-202.

Despite this low level of use, the Applicant has gone to great lengths to mitigate potential impacts to this species. Early on, the Project was redesigned to eliminate 14 wind turbines in response to documented sightings of PBS. OWEF-59596; *see also* OWEF-909. As a condition of approval, the Applicant has prepared a Habitat Restoration Plan designed to restore the Carrizo Marsh, a historically important resources for the PBS. *See* OWEF-2767-2807. Under this Plan, for the 43.1 acres of PBS Essential Habitat that are permanently impacted by the Project, the Applicant will restore 86.2 acres (or double the impacted acreage) of off-site habitat.[10] OWEF-2779. For the 124.1

[10] Federal Defendants dispute the claim that the "Project will occupy nearly 3,700 acres of Essential Habitat for the Peninsular Bighorn Sheep." The actual area of disturbance for the entire project is 574 acres, OWEF-590, and only 167.2 acres of Essential Habitat will be impacted by the Project, OWEF-1588.

acres that will be temporarily impacted by the Project, the Applicant will apply off-site and on-site mitigation to 248.2 acres of PBS Essential Habitat. *Id.* In addition, the ROD requires the Applicant to prepare and implement a Bighorn Sheep Mitigation and Monitoring Plan ("MMP"). It is with this document that Plaintiffs take issue.

Plaintiffs claim that the impacts of wind turbines on PBS are unknown and should be fully researched, notwithstanding the absence of PBS on the Project site. Pls.' Br. at 18. While the BLM acknowledges that there is a lack of data regarding the behavioral response of PBS to wind turbines, the BLM reasonably relied on studies involving other animals to develop its conclusions. Plaintiffs, however, demand more. Not only do Plaintiffs dispute the appropriateness of the BLM's use of other non-PBS studies, they insist that it is improper to first monitor the impacts to the species and then apply mitigation in response to that information. Pls.' Br. at 19. This is contrary to law. *Okanogan Highlands Alliance*, 236 F.3d at 477 (holding that discussion of mitigation measures was adequate even though "the actual adverse effects are uncertain, and the EIS considered extensively the potential effects and mitigation processes" (emphasis in original)); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) (rejecting plaintiffs' argument that mitigation plan "violated NEPA's requirement to evaluate environmental impacts *before* actions are taken") (emphasis in original); *W. Watersheds Project v. Bureau of Land Mgmt.*, No. 3:11-cv-53, 2011 WL 1630789, at *3 (D. Nev. Apr. 28, 2011); *Pub. Utils. Comm'n of Cal v. F.E.R.C.*, 900 F.2d 269, 282-83 (D.C. Cir. 1990); *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1231-32 (E.D. Cal. 1999). Moreover, FWS recommended monitoring and mitigation precisely because there is no data on the effects of wind turbines on PBS. OWEF-182 ("The lack of data concerning ungulate behavior around wind turbines underscores the importance of monitoring efforts in the project vicinity.").

Accordingly, there is no merit to Plaintiffs' argument that the BLM did not take a "hard look" at PBS or that the Bighorn Sheep MMP improperly defers environmental

data gathering and analysis.

F. Plaintiffs Cannot Raise an Environmental Justice Claim

Plaintiffs allege a violation of Executive Order 12898 on Environmental Justice, not on behalf of themselves, but on behalf of unspecified Native Americans who are not parties to this case. Pls.' Br. at 19. Plaintiffs' argument fails for two reasons. First, the Executive Order clearly states that "this order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers or any other person with this order." 59 Fed. Reg. 7629, 7633 (Feb. 11, 1994). Thus, Plaintiffs cannot allege a violation of Executive Order 12898. *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 575 (9th Cir. 1998).

Second, Plaintiffs lack standing. In order to have constitutional standing, the following elements must be established: (1) the plaintiff must have suffered an injury in fact; (2) there must be some causal connection between the injury and the conduct complained of, and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs must meet the established three part test for each claim raised. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011). Plaintiffs cannot plausibly allege any injury in fact when the injury they complain of does not affect them but third-party Native Americans. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiffs "must allege and show that they personally have been injured").

IV. The Final EIS's Mitigation Measures Comply with NEPA

NEPA does not impose a substantive duty to mitigate. *Robertson*, 490 U.S. at 353; *see also Busey*, 938 F.2d at 206 (holding that NEPA does not require an agency to effect specific types of mitigation). So long as mitigation measures are discussed in "sufficient detail to ensure that environmental consequences have been fairly evaluated," an agency's NEPA obligations have been met. *Carmel*, 123 F.3d at 1154 (quoting *Robertson*, 490 U.S. at 353). A mitigation plan "need not be legally enforceable, funded

or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4.

Plaintiffs claim that a number of mitigation measures developed as part of the Project are flawed because they defer analysis of the effectiveness of mitigation until after completion of the NEPA analysis. As discussed previously, *supra* at 19, mitigation measures can be adjusted and modified after the final agency decision has been approved, to address on-the-ground conditions. *See Theodore Roosevelt Conservation P'ship*, 616 F.3d at 515; *W. Watersheds Project v. Bureau of Land Mgmt.*, 2011 WL 1630789, at *3; *Pub. Utils. Comm'n of Cal.*, 900 F.2d at 282-83; *Sierra Club*, 69 F. Supp. 2d at 1231-32.

Plaintiffs' argument also fails because they do not take into account that these mitigation plans are generally only one aspect of the mitigation strategy for these resource values. *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 515 (declining to consider only one portion of the project's overall mitigation strategy and upholding the project's entire mitigation plan). In most instances, the Applicant is committing to multiple mitigation measures to address resource impacts. *See generally* OWEF-341-75. This is best demonstrated by the mitigation for PBS, as described in great detail above, where the Applicant has removed turbines, committed to essential habitat restoration, and proposes to employ adaptive management to address potential impacts to the species. These mitigation measures can in no way be compared to the mitigation at issue in *South Fork*, where the court noted the EIS's only response to mitigation was that "'[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan.'" 588 F.3d at 727.

Plaintiffs make a general statement that the BLM "improperly deferred" its mitigation plans and then simply lists them. Plaintiffs' sole example of "improperly deferred" mitigation is the BLM's geotechnical analysis, and reliance on that example is misplaced. Plaintiffs contend that the geotechnical report should have been prepared before the ROD was issued and that by failing to do so, the BLM "improperly deferred"

mitigation and allowed the Applicant to change the design and location of the turbines without consequence. Pls.' Br. at 21. This argument fails to recognize that numerous geotechnical studies were submitted prior to the issuance of the ROD. OWEF 606; OWEF-31161-66; OWEF-34067-167. The purpose of the final geotechnical study is to facilitate final turbine micrositing "to ensure that the actual soil strength and other properties are consistent with the properties that were estimated using non-invasive seismic testing." OWEF-504; *see also* OWEF-606. The final geotechnical report does not allow the Applicant to make major modifications to the Project design or location as Plaintiffs seem to suggest. To do so would be in direct conflict with the ROW grant. OWEF-394-97. Thus, Plaintiffs' only example of improper mitigation falls flat.

V. The BLM Complied with FLPMA

This Court has already held twice that the "BLM did not act arbitrarily, capriciously or abused its discretion in allowing the Project on Class L lands." *Quechan Tribe*, 2013 WL 755606, at *11; *Desert Protective Council*, 2013 WL 755913, at *23-25. Plaintiffs raise the same issues that have already been rejected by this Court. Plaintiffs contend that the Project conflicts with the Class L designation, which generally prescribes low-intensity uses. Pls.' Br. at 22. This Court has already determined that the CDCA Plan contemplates wind energy development on Class L lands and that the myriad mitigation measures ensure that sensitive values are not significantly diminished. *Quechan Tribe*, 2013 WL 755606, at *10-11. Plaintiffs present nothing new that would compel this Court to render a different decision than in *Quechan Tribe* or *Desert Protective Council*.

VI. The BLM Complied with the MBTA

A. The BLM Had No Duty to Seek an MBTA Permit

Plaintiffs' MBTA claim asserts – erroneously – that the BLM, *acting in its regulatory capacity*, was required to obtain a take permit under the MBTA before authorizing a third party's proposed project. *See* Pls.' Br. at 23-25. Plaintiffs' argument

inappropriately seeks to impose a non-existent mandatory duty and procedure into the MBTA. Neither the Act nor its implementing regulations require the BLM to obtain a take permit before approving a third party's project. *See* 16 U.S.C. § 703 (outlining the Act's prohibitive (as opposed to proscriptive) structure); *see also* 50 C.F.R. Part 21. Indeed, in the nearly 100 years that FWS (or its predecessor) has implemented the MBTA, it has never interpreted the Act to require a federal agency, acting in a regulatory role, to obtain a take permit when authorizing third-party activities that may result in the taking of migratory birds incidental to an otherwise lawful activity. Consistent with that long-standing interpretation of the Act, FWS did not require the BLM to seek a permit.

Plaintiffs' reliance on the D.C. Circuit's decision in *Humane Society of the U.S. v. Glickman* ("*Glickman*"), 217 F.3d 882 (D.C. Cir 2000), is wholly misplaced. Pls.' Br. at 23. *Glickman* did not address the facts presented here, where a federal agency has acted in its regulatory capacity to approve the actions of a third party. In *Glickman*, the D.C. Circuit held that the U.S. Department of Agriculture's implementation of its management plan for Canada geese, which called for the agency to kill or take the migratory birds without first obtaining a take permit, violated the Act. Thus, in *Glickman*, the federal agency itself proposed to take an action, the very purpose of which was the killing or taking of migratory birds. Here, by contrast, the BLM, acting in its regulatory capacity, approved a third party's proposed project pursuant to FLPMA, 43 U.S.C. § 1761(a)(4) . *Glickman* does not apply to the situation presented here.[11]

[11] Additionally, under the circumstances at issue in *Glickman*, the MBTA regulations provide for an intentional take permit. *See* 50 C.F.R. Part 21. In contrast, under the circumstances presented here, FWS has not adopted regulations requiring permits for all activities that could potentially result in unintentional taking of migratory birds or require an agency to get a permit before authorizing such activity. FWS has not created such a system in large part because it would be impractical to do so. For instance, tens of millions of birds may be killed annually from collisions with cars, and building window strikes may cause even more deaths annually. *See* FWS Migratory Bird Mortality Fact Sheet, available at http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/Mortality-Fact-Sheet.pdf (last visited July 17, 2013).

No court has ever held that a federal agency has violated the MBTA by acting in a regulatory capacity to authorize a third party's project. The reason for that is clear: a violation of the MBTA, by its terms, requires *an actual* "take" of a protected bird. *See* 16 U.S.C. § 703(a) ("it shall be unlawful . . . to pursue, hunt, take, capture, [or] kill . . . any migratory bird"). Plaintiffs have not alleged (nor can they) that any protected bird actually has been taken by the BLM's issuance of the ROW grant. That activities covered by the BLM's ROW grant might conceivably someday result in a take of a protected bird is irrelevant to Plaintiffs' claims against the BLM. Future independent actions by third parties do not establish a current actionable violation of the MBTA. *See Native Songbird Care & Conservation v. LaHood*, No. 13-cv-2265, 2013 WL 3355657, at *9 (N.D. Cal. July 2, 2013). Furthermore, the third-party Applicant, not the BLM, would be exposed to possible liability under the MBTA, subject to the enforcement discretion of FWS. Notably, Congress did not see fit to provide any private right to enforce the MBTA. As such, this Court should reject Plaintiffs' attempt to circumvent that limitation by means of a claim under the APA based on an unreasonably expansive theory of derivative liability for regulatory actions.

B. The BLM Acted Reasonably and was not Arbitrary or Capricious

Although an MBTA take permit was not required, the BLM did not ignore migratory birds in its decision-making. In an effort to minimize and avoid impacts, the BLM first analyzed numerous pre-site-selection monitoring data and bird/nest surveys that allowed the BLM to choose a project site with minimal risks to migratory birds. OWEF-2934-69. Next, fully aware that the selected site would still result in some impacts, the BLM collaborated with FWS and the Applicant to craft an Avian and Bat Protection Plan ("ABPP") for the project. OWEF-722; 1593-99; 2922.

The ABPP is specifically designed to conserve migratory birds through numerous protective measures, including: (1) best management practices and advanced conservation practices to avoid and minimize risk, OWEF-2970-72; (2) post-construction

monitoring and reporting, OWEF-2972-81; and (3) adaptive management procedures based on the post-construction monitoring, OWEF-2981-84. These measures are to be implemented prior to, during, and following construction to protect migratory birds. The ABPP is designed to inform future BLM and FWS decision-making regarding the imposition of subsequent mitigation measures should FWS find them necessary. OWEF-2972-84. Furthermore, the ABPP is a key component of the ROW grant, which requires the Applicant to have the ABPP accepted by FWS prior to beginning construction of the project. OWEF-470. FWS has reviewed and accepted the ABPP. OWEF-722.

In sum, the BLM met its obligations under the MBTA and the implementing regulations in granting the ROW. It thoroughly analyzed the Project's potential impacts on migratory birds, developed numerous measures to avoid and minimize those risks, and imposed enforceable monitoring requirements on the Applicant. In addition, the ROW grant also requires the Applicant to comply with all applicable laws and regulations, including the MBTA. OWEF-458. The ROW terms allow the BLM to take appropriate action in the future while preserving FWS's independent ability to enforce the MBTA. OWEF-458-59. This demonstrates that the BLM complied with its obligations with respect to migratory birds and was entirely reasonable in its decision-making.

CONCLUSION

For the reasons stated above, this Court should deny Plaintiffs' Motion for Summary Judgment and grant Federal Defendants' cross-motion.

Respectfully submitted,

DATED: July 17, 2013

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CERTIFICATE OF SERVICE

I, Ayako Sato, hereby certify that, on July 17, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 17, 2013

/s/*Ayako Sato*
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